RECORD NOS. 16-1357(L), 16-1421

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,

Intervenor for Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties appearing before the National Labor Relations Board below and parties or intervenors in this Court:

1. E. I. du Pont de Nemours and Company

2. National Labor Relations Board

3. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

B. Rulings Under Review

The rulings at issue in these cases are the decision and orders of the National Labor Relations Board Case Nos. 9-CA-40777 (Louisville Works), 9-CA-41634 (Louisville Works) and 4-CA-33620 (Edge Moor), all of which are reported at *E. I. DuPont de Nemours*, 364 NLRB No. 113 (Aug. 26, 2016). All of the rulings under review are included at pp. 858-887 of the Joint Appendix.

C. Related Cases

This case, involving the same parties, has been before the Court previously. The Court's decision in the prior-related case is set forth in *E.I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012) and is included at pp. 845-857 of the Joint Appendix.

CORPORATE DISCLOSURE STATEMENT

(a) E. I. du Pont de Nemours and Company has no parent company and no public company owns 10% or more of its stock.

(b) E. I. due Pont de Nemours and Company is engaged in the chemical manufacturing business.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

<u>RULE</u>

STATEMENT OF JURISDICTION

This is a petition for review of the final Orders of the National Labor Relations Board ("NLRB" or the "Board") entered on August 26, 2016, in NLRB Case Nos. 9-CA-40777 (Louisville Works), 9-CA-41634 (Louisville Works) and 4-CA-33620 (Edge Moor). The NLRB had subject-matter jurisdiction over this matter pursuant to 29 U.S.C. § 152. This Court has jurisdiction to hear this petition for review pursuant to 29 U.S.C. § 160(f) and Rule 15 of the Federal Rules of Appellate Procedure. Petitioner filed its Petition for Review on October 14, 2016.

STATEMENT OF THE ISSUES TO BE RAISED ON APPEAL

Petitioner presents the following Statement of the Issues to be Raised on Appeal:

1. Did the NLRB commit legal error by finding that E. I. du Pont de Nemours and Company ("DuPont") violated Sections 8(a)(l) and (5) of the National Labor Relations Act by implementing unilaterally certain changes to its BeneFlex Flexible Benefit Plan ("BeneFlex")?

STATUTES, REGULATIONS AND OTHER AUTHORITIES

The relevant statutory provisions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

A. Introduction

This case returns to this Court for the second time, following yet another exercise in impermissible "ad hocery" by the NLRB. In *E.I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012) ("*DuPont I*") (App. 845),[1] this Court granted DuPont's Petition for Review and denied the NLRB's application for enforcement, holding that DuPont, by making unilateral changes to its "BeneFlex" benefit plan after expiration of the collective bargaining agreements, "maintained the *status quo* expressed in the Company's past practice." This Court remanded, instructing the Board to conform its decision to prior precedent or explain why it deviated from that precedent. Four years later, a majority of the Board issued a new, results-oriented decision that does neither and which cannot withstand scrutiny. Rather than conform its decision to prior precedent, the Board majority overruled the precedent this Court applied, and upon which DuPont relied, deeming that precedent an aberration.

The Board's new reasoning is fatally flawed. First, the Board's analysis cannot be reconciled with Supreme Court precedent and 50 years of Board law

[1] Referenced pages from the Joint Appendix are denoted as "(App.)." The Joint Appendix used in this case is the same as the Joint Appendix in *DuPont I*, except that this Court's prior opinion (App. 845-857) and the Board's decision on review (App. 858) have been added.

permitting unilateral changes that are "in line with" the parties' past practice. Second, the Board has – again – conflated "waiver" principles with the past practice analysis required by that precedent. Third, the Board's new decision changes the "deal" reached by the parties decades ago, thereby imposing new, substantive terms that were never bargained. This latest exercise in "ad hocery" yields an unjust, unworkable, and indefensible outcome that this Court should correct.

B. Factual Background

1. The Parties

One of the world's leading chemical manufacturers, DuPont operated plants in Louisville, Kentucky and Edge Moor, Delaware at all times relevant to this case. (App. 15, 30). Production and maintenance employees at the Louisville facility have been represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its predecessor unions (hereinafter the "Union") for nearly 50 years. (App. 15, 18, 143: ¶ 1). The Union also represented the production and maintenance employees at Edge Moor for decades. (App. 30, 623-24: ¶ 2).

2. The BeneFlex Plan

In 1991, DuPont created the "BeneFlex Flexible Benefits Plan," a welfare benefits plan for its entire domestic workforce of about 60,000 participants and beneficiaries. (App. 625: ¶ 6). BeneFlex is a cafeteria-style, flexible benefits plan, governed by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). BeneFlex is comprised of several subsidiary plans that provide a variety of benefits such as healthcare, offered through the BeneFlex Medical Care Plan ("BeneFlex Medical"), as well as dental, vision, and life insurance benefits, among others. (App. 44-45). The plan documents for BeneFlex and its components, including BeneFlex Medical, have always contained language (the "reservation of rights" language) granting DuPont the right to change the plans its sole discretion. Each of the plan documents states: "[t]he Company reserves the sole right to change or discontinue this Plan in its discretion ..." (App. 15, 31, 174, 195).

A BeneFlex annual enrollment period occurs each fall, allowing all plan participants to elect the benefit options they desire. (App. 52-53, 144-45: ¶ 6, 624 ¶ 3). <u>All</u> DuPont employees (union-represented and non-union-represented alike) in the United States participated in BeneFlex at all relevant times. (App. 45, 144-45: ¶ 6, 535).

3. The Parties' Agreement Regarding BeneFlex At Louisville

During the parties' collective bargaining negotiations in 1994, DuPont offered Louisville bargaining unit employees the opportunity to participate in BeneFlex, including BeneFlex Medical. (App. 144: ¶ 4). DuPont explained that, as a condition of the Company's agreement to include Union-represented employees in BeneFlex, the Company would retain the right to alter unilaterally the levels and/or costs of benefits on an annual basis, consistent with the BeneFlex plan documents' reservation of rights language, provided that any such changes would be made only on a nationwide basis. (App. 46-48, 145: ¶ 7, 174: ¶ 4). The Union's agreement to DuPont's right to modify BeneFlex unilaterally was the "price of admission" for its members' participation in BeneFlex. After extensive discussions, the Union accepted BeneFlex with the understanding that participation in BeneFlex was subject to <u>all</u> terms and conditions of the BeneFlex plan documents, including the reservation of rights language. (App. 145: ¶ 7, 459). BeneFlex was implemented on that basis at Louisville effective January 1, 1995. (App. 145: ¶ 7).

4. The Parties' Agreement Regarding BeneFlex at Edge Moor

The Union agreed to BeneFlex at Edge Moor on identical terms. Following negotiations, BeneFlex was added to the parties' August 1993 collective bargaining agreement (CBA"), and Union members began receiving BeneFlex benefits on January 1, 1994. (App. 625: ¶¶ 7, 11). As at Louisville, the Union agreed to the reservation of rights language in the BeneFlex plan documents (App. 625: ¶¶ 7, 8). The Union at Edge Moor, as at Louisville, understood that participation in BeneFlex was contingent upon acceptance of this condition. (App. 626: ¶ 9).

DuPont's right to modify BeneFlex unilaterally was reconfirmed in subsequent negotiations. On October 11, 1999, in discussing the then-upcoming BeneFlex changes, DuPont reiterated that it had the right to alter and modify coverages and costs under the reservation of rights language. (App. 631: ¶ 23). During contract bargaining in 2000, DuPont's negotiators reiterated the Company's retained right to modify BeneFlex coverages, premiums, and costs pursuant to the reservation of rights provision. (App. 633: ¶ 27). The 2000 CBA at Edge Moor subsequently confirmed the parties' longstanding agreement, stating: "employees shall also receive benefits as provided by the Company's BeneFlex Benefits Plan, *subject to all terms and conditions of said Plan*." (App. 707) (emphasis added).

5. Past Practice - Unilateral Changes To BeneFlex

DuPont has implemented nationwide changes to BeneFlex on January 1 of every year since introducing BeneFlex in 1991. Those changes have applied to all of DuPont's U.S. employees, including those at Louisville and Edge Moor, following the Union's agreement to BeneFlex. As summarized by a chart in the Joint Appendix (App. 841-44), the annual changes included regular and reasonable modifications to premiums, co-pays, and benefits levels. On occasion, the changes included adding or dropping programs within BeneFlex. *Id.* Many of the changes improved the BeneFlex offerings, such as modifying BeneFlex eligibility language to extend benefits to same-sex partners and creating a Health Savings Account to allow employees to pay health care costs on a tax-deferred basis. (App. 165 ¶ 66, 427, 841-844).

Annual modifications were never a surprise to workers or the Union. Employees received information concerning upcoming changes prior to the annual enrollment period each fall, (App. 52-53, 144-45: ¶ 6), with the Union receiving prior notice of upcoming changes at meetings with management. (App. 147-64: ¶¶ 114, 16, 21, 25, 27, 29, 41, 52, 58, 63).

Since BeneFlex was agreed to at both locations, the parties have never bargained over the annual BeneFlex changes. The longstanding past practice of annual, nationwide BeneFlex changes existed, without Union objection, even though the Louisville CBA does not reference BeneFlex, and the Edge Moor CBA did not do so until a 2000 memorandum reconfirmed the Union's acceptance of the reservation of rights language in the BeneFlex plan documents. Thus, apart from the parties' agreement that DuPont retained the right to make nationwide changes to BeneFlex (as reflected in the "reservation of rights language"), the parties also established a clear, decade-long practice of annual, nationwide changes to BeneFlex at Louisville and Edge Moor.

6. The Union's Efforts to Renege on the BeneFlex Agreements

a. Louisville

In January 2002, the Union opened the Louisville CBA to negotiate a successor agreement. (App. 159: ¶ 46, 356). The parties agreed that if a new contract was not reached by expiration date, DuPont would continue all terms and conditions of the expired contract day-to-day until new terms were negotiated. (App. 159-60: ¶ 47, 357-58). On October 24, 2002, the Union wrote to request bargaining over the upcoming annual BeneFlex changes. (App. 374). DuPont informed the Union that DuPont was permitted to implement the announced BeneFlex changes based on the parties' agreement and past practice, but that DuPont would consider any healthcare proposals the Union had to offer. (App. 375). On January 1, 2003, DuPont implemented the annual changes to BeneFlex, as it always had, even though the CBA had expired. (App. 161: ¶ 55).

The same pattern was repeated in the fall of 2003 and 2004. (App. 163-164: ¶¶ 59-61, 64-65). Although the Union's correspondence in those years requested bargaining over the announced changes, the Union never proposed a new or different medical plan. Nor did it seek to discuss the upcoming changes to

BeneFlex. After implementation, the Union filed unfair labor practice charges with the Board, challenging the 2004 and 2005 annual changes to BeneFlex. (App. 163-65: ¶¶ 59-61, 64-65; 411-13, 423-25).

b. Edge Moor

Beginning in 1994 and continuing each year thereafter until 2004, the parties at Edge Moor followed the same practice as they had at Louisville. Each October, DuPont and the Union met and discussed the upcoming changes to BeneFlex, which were later communicated to all employees as part of open enrollment. The Company then implemented the changes at Edge Moor – and nationwide – on January 1 of each year. (App. 627-638: ¶¶ 13, 15, 17, 19, 21, 24, 30, 32, 34, 37). DuPont never offered to negotiate the annual changes, and the Union neither sought to bargain over them nor objected to their implementation. *Id*.

On March 31, 2004, DuPont notified the Union that it was terminating the existing CBA. (App. 638). Negotiations for a successor agreement began in April 2004 and continued into 2005 (App. 638-46: ¶¶ 38-65, 550). DuPont proposed that the CBA expressly state what had always been the case: that the Company retained the right to adjust BeneFlex annually, even after CBA expiration, until the parties negotiated a different arrangement. (App. 536-37, 575). The Union refused to consider the proposal, and made no counterproposal regarding health care issues for months. (App. 54-541, 576-578, 811).

Consistent with historical practice, the annual nationwide modifications to BeneFlex were announced at Edge Moor on October 11, 2004. (App. 545, 642: ¶ 53). The Union did *not* request bargaining over the changes at the bargaining session held just two days later. (App. 545-46). DuPont negotiators suggested to the Union that bargaining unit employees should make their annual enrollment period elections. The Union did not object. (App. 545-46, 812-13). As in the past, Edge Moor employees participated in open enrollment, and modified their BeneFlex benefits for the new plan year as they deemed appropriate.

While the Union sent DuPont a letter requesting bargaining over the 2005 BeneFlex changes, it abandoned that token request by failing to follow up on it at the bargaining table. (App. 546, 812-813). The Union never expressed any desire to bargain over the changes, nor even mentioned the topic, during subsequent bargaining. (App. 547). Instead, the Union proposed an alternative to BeneFlex on November 8, 2004, almost a full month after the 2005 BeneFlex changes were announced. (App. 814-36). A week later, on November 16, the Union withdrew its proposal and offered two new alternatives. (App. 549, 837-38). Neither alternative sought to modify the announced BeneFlex changes. *Id*. DuPont rejected both proposals. (App. 549).

Because no agreement had been reached and no further negotiation sessions were scheduled in 2004, DuPont implemented the announced changes on January

1, 2005. (App. 549-50, 815). Following implementation of the changes on January 1, 2005, the Union filed an unfair labor practice charge, asserting that the 2005 BeneFlex changes at Edge Moor violated the National Labor Relations Act (the "NLRA" or the "Act").

C. Procedural History

1. The ALJ Decisions

The NLRB's General Counsel issued separate Complaints arising out of the changes made at Louisville and Edge Moor, and the cases were tried separately. In December 2005, Administrative law Judge (ALJ) Karl Buschman dismissed the Louisville charges, finding that the 2004 and 2005 BeneFlex changes were lawful. (App. 26). In reaching that conclusion, he held that implementing the changes to BeneFlex after contract expiration was consistent with: (1) the terms of the BeneFlex plan itself; (2) the parties' agreements and understandings regarding BeneFlex; and (3) a clear and well-established ten-year practice of unilaterally implemented annual changes. (App. 25-26). Accordingly, he found that DuPont's implementation of the 2004 and 2005 changes lawfully maintained the post-contract *status quo*. *Id.*

By contrast, relying on a waiver theory, ALJ Paul Bogas issued a decision in December 2005 finding that DuPont violated the NLRA by implementing at Edge

Moor the nationwide BeneFlex changes in 2005. (App. 39). He rejected the argument that the changes were part of an established *status quo*. (App. 35-37).

2. The NLRB's Initial Decisions

In August 2010, a divided NLRB issued opinions in both cases finding that DuPont's implementation of the annual BeneFlex changes at Louisville and Edge Moor was unlawful. (App. 18, 27). The Board majority relied solely on a waiver analysis, concluding that all of the previous changes at both locations had been permissible only because the Union had waived its right to bargain through a contractual management rights clause. (App. 15- 16, 27). The majority said that since both CBAs had terminated, the management rights clauses within those CBAs had expired, both extinguishing DuPont's right to continue making the annual BeneFlex changes and nullifying the past practice of annual changes. The majority concluded that the right to make the BeneFlex changes was based solely on a contractual waiver. (App. 15-17, 27). In the Louisville decision, the NLRB rejected DuPont's argument that it was permitted to implement the changes as a discrete, recurring event, finding that DuPont refused to bargain over the changes upon request. (App. 177).

Former Board Member Schaumber dissented in each case, noting the majority relied on an incorrect legal theory, thereby ignoring and misinterpreting NLRB precedent. (App. 18-22, 27-19). He recognized that the BeneFlex changes made in 2004 and 2005 did not constitute a "change" to the *status quo* because they were consistent with the parties' past practice of prior changes:

> It is well understood, however, that the concept of "change" within labor law cannot be approached simplistically; under certain circumstances, not to change would be *to change*. Thus, where an employer's "changes" actually continue a *status quo* past practice of like changes, the employer has not changed existing conditions of employment, and therefore has not violated [the NLRA].

(App. 19-20).

The dissent noted that the Union had specifically agreed that bargaining unit workers would receive BeneFlex benefits subject to the plan's terms and conditions, including the reservation of rights language. The dissent concluded that the parties' agreement regarding BeneFlex was not contained in or dependent upon any management rights clause in the expired CBAs. Rather, it was part of the parties' original agreement to implement BeneFlex at each location, an integral part of which was the Union's acceptance of the reservation of rights language. (App. 20).

DuPont filed a Petition for Review of the Board's decisions with this Court, and the Board filed cross applications for enforcement.

3. This Court's First DuPont Decision

In June 2012, this Court granted DuPont's Petition for Review and denied the Board's application for enforcement. (App. 845). The Court held that "DuPont, by making unilateral changes to BeneFlex after the expiration of the CBAs maintained the *status quo* expressed in the Company's past practice." (App. 851). The Court observed: "Under *Katz*, an employer unilaterally may implement changes 'in line with [its] long-standing practice' because such changes amount to 'a mere continuation of the *status quo*.'" (App. 849) (citing *Katz*, 369 U.S. 736, 746 (1962)). Rejecting the Board's waiver analysis, the Court stated: "[I]t is the actual past practice of unilateral activity under the management-rights clause of a CBA, and *not the existence of the management rights clause* itself, that allows the employer's past practice of unilateral change to survive the termination of the contract." *Id*. (quoting *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002)) (emphasis added).

This Court also noted that the Board's decisions were at odds with decisions reached in prior cases, such as in *Courier-Journal*, 324 N.L.R.B. 1093 (2004), *Capitol Ford*, 343 N.L.R.B. 1058 (2004) and *Beverly Health & Rehab. Servs., Inc.*, 346 N.L.R.B. 1319 (2006) ("*Beverly 2006*"). The Court found that the Board failed to give any reasoned justification for departing from its prior precedent. That precedent made clear (1) the "mere fact that the past practice at issue was developed under a now-expired contact does not gainsay the existence of past practice," and (2) an employer is permitted to make unilateral changes following contract expiration if those changes are "consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract." (App. 878-879).

The Court remanded the cases, instructing the Board to either conform its decisions to prior precedent or explain why it deviated from that precedent. (App. 854). Having rejected the Board's analysis on past practice, the Court did not address DuPont's remaining arguments, including DuPont's claim that the Board's decision was inconsistent with this Court's "contract coverage" case law. (App. 853).

4. The Board's Second Decision

On August 26, 2016, a divided NLRB issued a decision finding that DuPont's implementation of the BeneFlex changes at Louisville and Edge Moor violated the NLRA. In so doing, the Board majority overruled decisions relied upon by DuPont and referenced in this Court's initial decision – namely *Courier-Journal*, *Capitol Ford* and *Beverly 2006*, claiming those cases are inconsistent with well-established waiver principles and longstanding Board precedent. Specifically, the Board majority stated such precedent is "irreconcilable with established law ***limiting the duration of waivers under a contractual management-rights clause***".

(App. 862). The Board held that the BeneFlex changes were not consistent with the *status quo* because they were not "automatic" or based on "fixed criteria" and involved the exercise of employer discretion. (App. 864-66).

Member (now Acting Chairman) Miscimarra dissented. As the dissent makes clear, the Board's new standard for what constitutes a "permissible change" to the *status quo* is contrary to *Katz*. And it irrationally confuses "contract waiver" principles with the analysis of past practice and the controlling definition of the *status quo*:

> Most people understand what "change" means, and I believe this common-sense understanding is what the Supreme Court in *Katz* embraced: **when an employer takes action consistent with what it did before, this is not a "change."** . . . it does not matter whether or what kind of CBA may exist, or may have existed, when evaluating whether particular actions constitute a "change." My colleagues' view to the contrary improperly confuses the Board's treatment of contractual waivers of the right to bargain – which depend on the existence of a CBA – and what constitutes a "change" for purposes of *Katz*. Equally incorrect . . . is my colleagues' finding that every employer action constitutes a "change" that requires bargaining, even if it is identical to what the employer has always done, if the action involves any employer "discretion."

(App. 875). The dissent also demonstrates that the majority is simply wrong in asserting that the cases relied upon by DuPont, endorsed by this Court, and now overruled by the Board, are exceptions to a uniform body of Board law concerning permissible changes to the *status quo* under *Katz*. The dissent also shows that the new standard adopted by the Board will not promote collective bargaining and foster stable labor relations.

DuPont filed a Petition for Review of the NLRB's decision, the NLRB filed a cross petition for enforcement, and this appeal followed.

STANDARD OF REVIEW

NLRB decisions are reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2). *W&M Props. Of Conn., Inc., v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). If the Board "fails to apply the proper legal standard," or where it departs from its own established precedent without "reasoned justification," its order "will not survive review." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004). Board decisions are not afforded deference when they rest on a misinterpretation of Supreme Court precedent or do not reflect reasoned decision making. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374-75 (1988). *See also Jacoby v. NLRB*, 233 F.3d 611, 614 (D.C. Cir. 2000). Board decisions should be affirmed only when they are not otherwise inconsistent with the law. *NLRB v. United Food & Commercial Workers Union 23*, 484 U.S. 112, 123 (1987).

Courts extend no deference to NLRB decisions turning on an interpretation of purely contractual terms, including provisions in agreements between an employer and a union. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 203 (1991). Agreements between an employer and union are interpreted *de novo*, *Enloe Med. Cr. v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005); *NLRB v. United States Postal Service*, 8 F.3d 832, 837 (D.C. Cir. 1993), consistent with the settled notion that courts decide legal issues and accord no deference to an agency's analysis of the common law. *See, e.g.*, *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. March 3, 2017); *Aurora Packing Co. v. NLRB*, 904 F.2d 72, 75-76 (D.C. Cir. 1990). *See also NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). Deference is thus not afforded to the NLRB in determining whether an employer's actions are "covered by" the parties' agreements. *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008).

Courts also extend no deference to Board decisions interpreting other statutes. *See*, *e.g.*, *Cactus Canyon Quarries, Inc. v. FMSHRC*, 820 F.3d 12 (D.C. Cir. 2016).

The Board's adoption of a new test for assessing whether changes made by an employer during a contractual hiatus are permissible is subject to arbitrary and capricious review. The NLRB must demonstrate a "reasoned justification" for such a change "under a legal theory that permits a [party] reasonably to 'predict' whether a particular practice will be lawful or not. Otherwise, we sanction impermissible 'ad hocery' on the part of the Board which is the core concern underlying the prohibition of arbitrary or capricious agency action." *Pac. Nw. Newspaper Guild v. NLRB*, 877 F.2d 998, 1003 (D.C. Cir. 1989).

Factual determinations made by the Board will not be enforced if not supported by substantial evidence. Where the record evidence is "in conflict, the substantial evidence test requires the Board to take account of contradictory evidence, and to explain why it rejected evidence that is contrary to its findings." *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 809 (D.C. Cir. 2007) (quotation omitted).

SUMMARY OF THE ARGUMENT

DuPont's Petition for Review should be granted for several, independent reasons. *First*, the Board's decision is contrary to the Supreme Court's decision in in *Katz*, and more than 50 years of Board law. As *Katz* makes clear, changes to a term and condition of employment that are "in line with" the parties' past practice of prior changes represent a lawful continuation of the *status quo*. Rather than apply this straightforward analysis, the Board created a new, overly narrow legal standard pursuant to which a change will be deemed an unlawful deviation from the *status quo* unless it is virtually "automatic," made "according to "fixed" criteria and does not involve employer discretion – despite the change being fully "in line with" a history of similar changes.

Second, despite this Court's instruction, the Board has again conflated contract waiver principles with the past practice analysis required by *Katz*. The Board majority determined that a pattern of unilateral changes developed under a contractual management rights clause – a waiver – cannot continue following expiration of the management rights clause. But as this Court held in *DuPont I*, "whether a management-rights clause survives the contract is beside the point," because the relevant question is whether the changes at issue are similar in kind and scope to prior changes such that they represent a continuation of the *status quo*.

Third, the Board's decision errs by failing to honor the parties' decade-long agreement concerning BeneFlex and imposing, instead, substantive bargaining terms to which the parties never agreed in violation of longstanding Supreme Court precedent interpreting Section 8(d) of the NLRA, 29 U.S.C. § 158(d). The parties agreed that Union-represented employees could participate in BeneFlex, on the same terms as all other DuPont employees, consistent with DuPont's rights and obligations under ERISA, on the express condition that DuPont would retain the authority to make nationwide changes to BeneFlex unilaterally. The Board's decision, if left to stand, would effectively rewrite both that agreement and the BeneFlex plan, creating three separate versions of BeneFlex, one for Union employees at Louisville, one for Union employees at Edge Moor, and one for all other DuPont employees, each providing different benefits.

Fourth, even assuming *arguendo* that the Board's decision is correct, the Board erred by applying the decision retroactively. In *DuPont I*, this Court held that the BeneFlex changes at issue were lawful under settled Board precedent upon which DuPont relied. Unable to distinguish that precedent, the Board expressly overruled it, creating a new legal standard which, by the Board's own admission, is contrary to Board law spanning more than 50 years. Under these circumstances, it would be manifestly unjust for the Board to apply its decision retroactively.

STANDING

E.I. du Pont de Nemours and Company has standing with respect to this consolidated petition for review because it is a "person[] aggrieved" by a final order of the NLRB, and is seeking to have the order modified or set aside pursuant to 29 U.S.C. § 160(f). *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003).

ARGUMENT

I. THE BOARD ERRED IN RULING THAT THE BENEFLEX CHANGES AT ISSUE WERE NOT A LAWFUL CONTINUATION OF PAST PRACTICE

The Board found that DuPont violated Section 8(a)(5) of the Act when it implemented the 2004 and 2005 BeneFlex changes because those changes were not a continuation of the *status quo*. The Board's ruling regarding the past practice and the *status quo* is fatally flawed for several, independent reasons.

A. The Board's Decision Is Contrary To The Supreme Court's Ruling In *Katz*

It is well established that during bargaining, an employer is required to maintain the *status quo* and to refrain from unilateral changes to terms and conditions of employment. *Katz*, 369 U.S. at 745-46. But as this Court recognized, *Katz* also held that an employer "unilaterally may implement changes in line with its long-standing past practice because such changes amount to a 'mere continuation of the *status quo*.' (App. 849). The Board, as it must, has consistently applied this Supreme Court holding for more than 50 years. *See*, *e.g.*, *Shell Oil*, 149 N.L.R.B. 284 (1964); *Westinghouse Elec. Corp. (Mansfield Plant)*, 150 N.L.R.B. 1574 (1964); *Courier-Journal*, 342 N.L.R.B. 1093 (2004); *Capitol Ford*, 343 N.L.R.B. 1058 (2004); and *Arc Bridges*, 355 N.L.R.B. 1222 (2010), *enf'd denied*, 662 F.3d 1235 (D.C. Cir. 2011).

Courts have applied the same definition of the *status quo*. In *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002), for example, the Sixth Circuit specifically held that unilateral action may become part of the parties' "past practice," and an employer does not alter the *status quo* by continuing that past practice:

> [I]f an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a "term and condition of employment," and that a similar unilateral change after the termination of the CBA is permissible to maintain the *status quo*. Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.

Selectively citing snippets from *Katz*, the Board has now created a new and impermissibly narrow definition of the *status quo*, finding that a change in a term and condition of employment cannot be considered a continuation of the *status quo* unless the change is virtually "automatic" and made "according to fixed criteria" without involving the exercise of employer "discretion." (App. 864-66). The *Katz* doctrine, as the Board would now construe it, "freezes the *status quo* to the greatest extent possible" at contract expiration, except where there is a history of automatic or formulaic changes that would be expected "to continue in a ***non-discretionary*** regular manner." (App. 864).

The Board's decision impermissibly ignores the legal standard actually applied in *Katz.* In *Katz*, the employer granted merit pay increases in January, during bargaining, ranging between $2 and $10 to only 20 of 50 bargaining unit employees. To determine whether the merit increases were lawful, the Court analyzed whether "***the January raises were <u>in line with</u> the Company's long-standing practice of granting quarterly or semiannual merit reviews – in effect, were a mere continuation of the status quo.***" 369 U.S. at 746 (emphasis added). There was no evidence that the employer in *Katz* had a long-standing, much less a decade-long, practice of providing similar merit increases. Accordingly, the *Katz* Court found that the merit increases were not a lawful continuation of past practice, noting, *as a factual matter*, that the increases were not "automatic," were informed by a large measure of discretion, and "*there was no way for the union to know whether or not there has been a substantial departure from past practice*."

In crafting its new legal standard, the Board's majority relied on the Court's factual observation that the specific changes in *Katz* were not "automatic" and involved "discretion." In so doing, the Board ignored the legal standard the *Katz* Court actually applied: whether the changes were "<u>in line with</u> the Company's long-standing practice." The Board majority likewise ignored the Court's observation that in the absence of evidence of similar past employer actions "there was no way for the union to know whether or not there ha[d] been a *substantial departure* from past practice." 369 U.S. at 743.

The Board's dissent demonstrates that the appropriate legal analysis under *Katz* focuses on whether changes "represent a *continuation* of what the employer has done before." (App. 873). If the answer is "yes," then the change is merely a continuation of the *status quo*. The question of whether the change is permissible hinges on whether it represents a "substantial departure" from the changes the employer implemented in the past. The dissent's rationale is faithful to the holding and rationale of *Katz,* and demonstrates that the majority's decision must be set aside. *See NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 584 (1994) (rejecting a Board decision for being "inconsistent with the statute and our precedents").

B. The Board Decision Is Contrary To More Than 50 Years of Board Law And Confuses Waiver With Past Practice

In its appeal of the Board's first decision, DuPont relied principally on the Board's decisions in *Courier-Journal Capitol Ford* and *Beverly 2006*. In *DuPont I*, this Court ruled that the Board's first decision could not be reconciled with *Courier-Journal*, *Capitol Ford* or Beverly 2006.

Unable to adequately distinguish these cases, the Board has now expressly overruled them, claiming that they represent an extreme and unwarranted departure from what is claimed to be a long-standing body of Board precedent, as purportedly reflected in *Beverly Health & Rehab. Servs*., 335 N.L.R.B. 635 (2001), *enf'd in relevant part*, 317 F.3d 316 (D.C. Cir. 2003) ("*Beverly 2001*"), and *Register Guard*, 339 N.L.R.B. 353 (2003). The Board majority claims that overruling *Courier Journal*, *Capitol Ford* and *Beverly 2006* solves the problem, and returns Board law to its former state, where employers may implement changes unilaterally pursuant to an established past practice <u>only</u> if the changes are formulaic and do not involve the exercise of discretion. But the Board's attempt to re-write history by mischaracterizing years of Board precedent does not withstand scrutiny. As Member Miscimarra's dissent demonstrates, *Courier-Journal*, *Capitol Ford* and *Beverly 2006* are <u>consistent with</u> decades of extant Board law establishing that unilateral changes, following contract expiration, are a continuation of the *status quo* under *Katz*, even if they involve the exercise of discretion and are not automatic or formulaic. (App. 880) The Board's failure adequately to explain its reason for abandoning 50 years of precedent is arbitrary and capricious. *See ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017).

1. Well-Settled Board Precedent, Beginning Immediately After *Katz*, Demonstrates That Binding Past Practice Can Exist Despite The Exercise of Employer Discretion

The Board majority claims that with the exception of the cases it now overrules, the Board has consistently held that a change cannot be considered to be a "permissible continuation of the dynamic *status quo*" unless it is "automatic" and "made according to fixed criteria" without involving the exercise of employer discretion. (App. 864). This assertion is plainly wrong. The Board's newly-adopted interpretation of *Katz* is contrary to a long line of cases both predating and post-dating the *Courier-Journal*, *Capitol Ford*, and *Beverly 2006* decisions.

As the Board's dissent explains, the majority's position cannot be reconciled with *Shell Oil*, 149 N.L.R.B. 284 (1964), which was decided just two years after *Katz*. In *Shell Oil*, the parties' CBA contained a subcontracting clause authorizing the employer to subcontract bargaining unit work at its discretion. Exercising that discretion, the employer maintained a practice of subcontracting certain construction and maintenance work. Following expiration of the CBA, the employer continued its longstanding practice by subcontracting three construction and/or maintenance jobs unilaterally, without bargaining. The Board found no violation of 8(a)(5) because the post-expiration subcontracting was consistent with prior practice. In so ruling, the Board stated:

> We are persuaded and find that *Respondent's frequently invoked practice of contracting out occasional*

> *maintenance work on a unilateral basis*, while predicated upon [the subcontracting provision], *had also become an established practice and, as such a term and condition of employment*. . . it does not appear that the subcontracting . . . *materially varied in kind or degree from what had been customary in the past.* In these circumstances, we cannot say that Respondent's action in subcontracting, according to its established practice, certain work without prior notice to or bargaining with the Union during the period when no agreement was in effect was in derogation of a statutory duty to bargain. . . .

149 N.L.R.B. at 287-88 (emphasis added).

The Board reached the same conclusion in *Westinghouse Elec. Corp. (Mansfield Plant)*, 150 N.L.R.B. 1574 (1965). There the employer had an established practice of subcontracting work. The employer's decision to subcontract work was not "automatic" or based on "fixed criteria." Instead, in deciding whether "to retain or contract out the work, Respondent consider[ed] the possibility and economic advisability of doing the work with its own employees." *Id*. at 1579, 1575. Following that process, the employer subcontracted out bargaining unit work, from time to time, for more than two decades, including hiatus periods between contracts when the parties were negotiating for a successor CBA. The Board, applying *Katz*, held that the employer did not violate the Act by continuing to subcontract work consistent with its history of doing so.

> [T]here was no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with the

> Respondent's usual method of conducting its manufacturing operations. . . : *it did not during the period here in question vary significantly in kind or degree from what had been customary under past established practice.*

150 N.L.R.B. at 1576-1577 (emphasis added).

Since *Shell Oil* and *Westinghouse*, the Board has held repeatedly that a past practice of consistent changes creates a term and condition of employment, and that future changes similar in kind and degree are but a mere continuation of the *status quo*, even when the changes are in no sense "automatic" and even when the employer exercises discretion. In fact, many of the decisions cited by the Board majority permitted, and in some cases *required*, employers to make unilateral changes consistent with established past practice even though, as here, such changes were <u>not</u> automatic, and involved employer discretion.

For example, in *Dynatron/Bondo Corp*, 323 N.L.R.B. 1263 (1997), the employer violated by the Act by *failing* to continue its 6-year practice of merit increases, even though "the amount of the raises" was admittedly "<u>discretionary.</u>" Despite such discretion, the Board found that the employer's granting of pay increases became an established term of employment and the *status quo* under *Katz* because the raises were granted "with sufficient regularity," were provided "at *similarly* timed intervals" and had been provided "over a number of years." *Id*. at 1264; *see also Kal-Die Casting Corp*., 221 N.L.R.B. 1068, 1068 n.1 (1975) (employer's discretionary adjustments to work schedule deemed lawful because there was no evidence "that this activity varied from the Respondent's past practice"); *Cent. Maine Morning Sentinel*, 295 N.L.R.B. 376, 378-79 (1989) ("[T]he exercise of some discretion is not fatal to the conclusion that the raise was a condition of employment."); *Southeast Michigan Gas Co.*, 198 N.L.R.B. 1221, 1222-23, (1972), *enf'd*, 485 F.2d 1239 (6th Cir. 1973) (longstanding practice of granting wage increases constituted an established term of employment, even though employer's policy provided employer discretion to determine the size of the increases**)**; *Eastern Maine Med. Ctr. v. NLRB*, 658 F.2d 1, 8 (1st Cir. 1981) ("[i]ndefiniteness as to amount and a flavor of discretion [involving past practice of regular wage increases] does not prevent the undertaking from becoming part of the conditions of employment").[2]

The Board's decision in this case is particularly illogical in light of the position the Board advanced in *Arc Bridges*, 355 N.L.R.B. 1222 (2010), *enf'd denied*, 662 F.3d 1235 (D.C. Cir. 2011). In *Arc Bridges*, the employer maintained a practice, from 1999 to 2006, of reviewing its finances each June, and, if sufficient funds existed, granting across-the-board wage increases to its employees each July. In 2007, the employer reviewed its finances and contemplated giving an

[2] In other cases relied on by the Board majority, there was simply no established past practice with which to conform. *See, e.g.*, *United Hospital Med. Ctr.*, 317 N.L.R.B. 1279 (1995) (applying waiver analysis in absence of any established practice of relevant changes defining the *status quo*).

across-the-board 3% wage increase. As the employer was considering the 2007 wage increase, it was also negotiating with a newly certified union, which included bargaining over wages. After the employer decided against implementing the wage increases, the union filed an unfair labor practice charge, claiming that the employer's failure to grant the 3% increase was an unlawful deviation from past practice in violation of Sections 8(a)(1), (3) and (5) of the Act.

Based on those facts, the Board held that the employer's 8-year practice of considering, and often granting, wage increases had become an "*established term and condition of employment*" and that failing to continue the practice of granting wage increases in 2007 was unlawful. *Id*. at 1224. In its defense, the employer argued that there was no binding established past practice because "in several instances, [the employer] granted merit-based wage increases or bonuses at times other than July and that it provided no across-the-board increase in July 2002, 2003, and 2004." *Id*. Contrary to the majority's position here, the Board held that practice of granting wages increases had become an established term of employment even though the employer exercised significant discretion over whether to grant increases and the size of the increases. In fact, the Board expressly stated "**[t]hat the specific amount of the increase was not fixed is not significant.**" *Id*. at 1223, n.7 (emphasis added) (citing *Otis Hospital*, 222 N.L.R.B. 402, 404 (1976), *enf'd*. 545 F.2d 251, 255 (1st Cir. 1976)).

Before this Court, the Board continued to argue that the employer had established a binding pattern of wages increases – even though the increases were *not* automatic or formulaic, were *not* made according to fixed criteria and involved significant employer discretion. This Court reversed the Board, finding no established past practice based on the factual record presented because: (1) the employer "granted no wage increases in July 2002, July 2003, or July 2004 – three of the five years immediately preceding the 2007 wage decision at issue" and (2) a more appropriate review of the record showed that during the period 1992 through 2006, "Arc Bridges granted an across-the-board increase in six of fifteen years – less than half the time." *Id*. at 1239.

The legal standard applied by the Board in *Arc Bridges* is consistent with *Katz*, *Shell Oil*, *Westinghouse*, *Courier-Journal* and *Capitol Ford*, and simply is irreconcilable with the Board's position in this case. The Board's ad hoc, results-oriented approach to past practice analysis lacks a "logical explanation" and is arbitrary and capricious. *Carpenters & Millwrights Local Union 2471 v. NLRB*, 481 F.3d 804, 808-09 (D.C. Cir. 2007). *See also Mail Contractors of America v. NLRB*, 514 F.3d 27, 31 (D.C. Cir. 2008).

2. The Board Again Confuses Waiver Principles With Past Practice and the *Status Quo*

The Board majority relies principally upon *Beverly 2001* and *Register Guard* to justify overruling its decisions in *Courier-Journal*, *Capitol Ford* and *Beverly 2006*. In so doing, the Board has, once again, conflated contract waiver principles with past practice. (App. 862). And, as with the Board's first decision, the latest decision cannot be squared with *Katz*.

The Board relies on *Beverly 2001* and *Register-Guard* for the proposition that a waiver embodied in a management rights clause "lasts only until the contract expires," and therefore any employer actions involving discretion and implemented under a "contractual reservation of managerial discretion . . . cannot constitute a past practice that an employer could or should continue post-expiration." (App. 863). Stated differently, pursuant to the Board majority's reasoning, if an employer engages in repeated actions over time pursuant to a contractual management rights clause, those actions cannot form part of the *status quo* and similar actions cannot continue after expiration of the contract containing a management rights clause. By contrast, the Board majority states that if an employer engages in repeated action not tied to contract rights, then such "*extracontractual*" actions can become a binding term of employment – established by past practice – are part of the *status quo* and *must* be maintained after contract expiration.

As the dissent demonstrates, the Board's decision is internally inconsistent. (App 872). As noted above, the Board majority claims there is substantive difference between repeated actions taken pursuant to contractual authority and "extracontractual" actions that are not addressed by contract. (App. 862-63, 869). At the same time, the Board majority claims, inexplicably, that application of its legal standard does not require "drilling down" to examine the parties' contract. (App. 882). The Board cannot have it both ways. Either contractual authority is relevant to the past practice analysis or it is not.

More fundamentally, the Board decision is fatally flawed because a proper analysis of the past practice and the *status quo* under *Katz* does not turn on whether there is contractual authority underlying the past practice. As this Court observed in *DuPont I*, "the lawfulness of a change in working conditions made after the CBA has expired depends not upon 'whether a contractual waiver of the right to bargain survives the expiration of the contract' but rather upon whether change 'is grounded in past practice, and the continuance thereof.'" (App. 852). Other courts, consistent with *Katz*, have adopted the same analysis. *See, e.g.*, *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002) ("it is the actual past practice of unilateral activity under the management rights clause, and not the existence of the management rights clause itself, that allows the employer's past practice of unilateral changes to survive the termination of the contract").

The Board majority's improper reliance on a waiver analysis is likewise reflected in its claim that *Beverly 2001* overruled the analysis of past practice and the *status quo* applied in *Shell Oil* and *Winn Dixie*. (App. 863). Specifically, the Board majority argues that "*Beverly 2001* specifically stated that '[b]ecause <u>the waiver embodied in a management rights clause</u> lasts only until the contract expire, the *status quo* after contract expiration cannot include the right to make unilateral changes since such changes <u>cannot be made in the absence of a waiver</u>. (App. At 862). In fact, as the dissent explains, the Board in *Beverly 2001* merely commented that *Shell Oil* and *Winn Dixie* were "deemed" to have been overruled to the extent they stood for the proposition that a <u>management rights clause</u> does not survive contract expiration – an unremarkable proposition involving waiver. This is simply another case of the Board majority conflating waiver and past practice.

Two practical examples demonstrate the Board majority's failure to appreciate the material difference between waiver and past practice. *First*, assume an employer was party to a series of CBAs over a 20-year period that contained provisions granting the employer broad discretion to change an employee benefit plan unilaterally. Assume further that the employer exercised that discretion and implemented a 3% premium increase just once during the 20 year period. No one would reasonably contend that the employer would have the right to increase premiums based on past practice, following contract expiration, because no established "past practice" of similar changes exists within the meaning of *Katz*, *Shell Oil*, *Courier-Journal*, *Arc Bridges* or any of the other authorities on which DuPont relies.

Now, assume the employer, exercising its discretion, implemented a 2-3% premium increase every year for 20 years, depending on market conditions. Assume further that following expiration of its CBA, the employer decided to implement a 3% premium increase in year 21. According to the Board majority's in this case, that 3% premium increase would be unlawful because (1) the employer exercised discretion when deciding to implement the premium increase; and (2) the premium increases implemented over the prior 20-year period could not be part of the *status quo* because those increases were implemented pursuant to a contractual waiver. Such a result is plainly inconsistent with *Katz*, as the 3% premium change in this example would be "in line" with and not a "substantial departure" from 20-year history of similar changes.

C. The BeneFlex Changes are Lawful Under *Katz*

The BeneFlex changes at issue, while not "automatic" and involving some discretion, constitute a "continuation of the *status quo*" under *Katz*. There is no dispute that DuPont maintained a consistent decade-long pattern of making unilateral changes to BeneFlex affecting employees across the country. (App. 841-

844). DuPont implemented BeneFlex changes every year for a decade. During that period, DuPont consistently adjusted premiums, co-pays and various features of BeneFlex offerings. The changes were implemented at the same time every year. And as this Court found, the BeneFlex changes at issue "were similar in scope to those that had been made in prior years." (App. 851). The changes were also eminently reasonable, and in several cases enhanced the benefits made available to BeneFlex participants, including Union members. (App. 165 ¶ 66, 427, 841-844).

As this Court further recognized, DuPont's discretion in making BeneFlex changes was limited. *First*, BeneFlex, by its terms, prohibited DuPont from making unilateral changes during a plan year. (App. 851). *Second*, DuPont was obligated to treat Union-represented employees exactly the same as all other employees who participate in the plan. ERISA's fiduciary duty rules require that plan sponsors like DuPont act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). DuPont did not have the freedom to grant non-union employees a benefit and deny Union-represented employees the same benefit. *Id*.

In short, while the BeneFlex changes at issue were not automatic, or absolutely identical to all prior changes, they were clearly "in line with" past practice and constitute a continuation of the *status quo* under *Katz*. The Board's contrary conclusion is wrong as a matter of law.

II. THE BOARD'S DECISION IS FURTHER FLAWED BECAUSE IT IGNORES THE PARTIES' AGREEMENT, IMPOSES SUBSTANTIVE TERMS THE PARTIES NEVER AGREED TO, AND DOES NOT FOSTER STABILITY IN LABOR RELATIONS

A. The Board's Decision Re-Writes, Impermissibly, the Parties' Agreement Regarding BeneFlex

The Board's decision should be vacated because it hinges on a fundamental misunderstanding about the nature of the parties' agreement regarding BeneFlex. Contrary to the Board's exclusion, that agreement is supplemental to, and not dependent upon, the existence of a CBA.

After BeneFlex was created, DuPont offered Union members at Louisville and Edge Moor (as well as those elsewhere) the opportunity to participate in the BeneFlex Plan, and reap the benefits resulting from the economies of scale associated with a large benefit plan covering tens of thousands of participants. DuPont and the Union specifically discussed and agreed that the BeneFlex reservation of rights language set forth in the plan documents was a condition precedent to, or *quid pro quo* for, Union members' participation in the plan. The Union's agreement to DuPont's continued right to modify BeneFlex unilaterally – as the "price of admission" to the plan – was critical because DuPont needed to retain the right to modify the Plan on a nationwide basis, consistent with its rights and obligations as a plan sponsor under ERISA. *See Curtiss Wright Corporation v. Schoonejongen*, 514 U.S. 73 (1995). For obvious reasons, DuPont did not want nationwide BeneFlex changes to be held hostage by a union that represented a small fraction of those participating in the plan.[3]

The reservation of rights language gave the Union clear notice that DuPont retained the right to modify the plan at its discretion. *See, e.g.*, *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 854 (4th Cir. 1994) (retiree health care plan language stating the "Policy may be amended or discontinued at any time" put employees on notice that employer had the unilateral right to modify or terminate the plan and continued benefits were neither guaranteed nor vested); *Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (language stating "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet" was unambiguous).

The parties' agreements regarding BeneFlex remained in place at Louisville and Edge Moor following expiration of the CBAs at both sites. Union members at both locations continued to receive benefits under BeneFlex, pursuant to its terms thereafter.

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[3] Approximately 60,000 individuals participated in BeneFlex during the relevant period. Of that total, there were fewer than 250 Union-represented employees at Edge Moor and Louisville who participated in BeneFlex.

The Board majority's conclusion that the reservation of rights language in the plan documents somehow "expired," while Union members retained the right to enjoy benefits provided by all other terms of the BeneFlex is wrong. As dissenting Board Member Schaumber observed in the Board's initial decision:

> The Respondent and the Union struck a deal, under which unit employees would receive the benefits provided by the Plan, subject to the Plan's terms and conditions, one of which is the Respondent's reservation of the right to make changes to the Plan. To hold the latter condition as a matter of law, to be a management rights clause, would be to create, post contract expiration, an arrangement to which the Respondent ***never agreed***. The Respondent ***never*** agreed to provide benefits under the Plan uncoupled from the unilateral right to make changes therein. It agreed to provide those benefits ***conditionally***, and those conditions are as much a part of the parties' agreement concerning benefits as are the benefits themselves. The law should operate to maintain the benefits agreement postcontract, not to change it by stripping out conditions.

See DuPont Louisville, 355 N.L.R.B. at 1089 (Schaumber dissent) (emphasis in original, footnote omitted)

This Court has repeatedly held that if parties have negotiated and reached agreement on a term and condition of employment that permits unilateral action, the matter is "covered by" the parties' agreement, and the employer does not violate Section 8(a)(5). *Heartland Plymouth Court MI, LLC v. NLRB*, 2016 Fed. Appx. 11 (D.C. Cir. 2016). *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *NLRB v. Postal Servs.*, 8 F.3d 832, 836-37 (D.C. Cir. 1993); *see also*

Chicago Tribune Co. v. NLRB, 974 F.2d 993, 937-37 (7th Cir. 1992). This is so because, in such cases, the union and employer have, in fact, exercised their bargaining rights, and the Court is simply giving effect to the parties' agreement regarding the subject at issue.

The Board majority reaffirmed its prior finding that this Court's "covered by contract" analysis is inapplicable because this case "involves post-contract-expiration unilateral changes." (App. 866 n.26). The Board's refusal to follow this Court's contract coverage analysis warrants reversal. That the precedent regarding the parties' agreement here is not set forth in a CBA is of immaterial. Federal labor law has long recognized that any valid agreement between employers and unions can be enforced, not just those memorialized in a CBA. *See Smith v. Kessville Bus Co.*, 709 F.2d 914, 920 (5th Cir. 1983) ("it is well established that 301 must be broadly construed to encompass any agreement, written or unwritten, formal and informal, which functions to preserve harmonious relations between labor and management) (citing *Retail Clerks Int'l Assn. v. Lyons Dry Goods*, 369 U.S. 17 (1961)).

This Court's decision in *UMWA 1974 Pension v. Pittston Company*, 984 F.2d 469 (D.C. Cir. 1993) is illustrative. *Pittston* involved the interpretation of an "evergreen clause" in a pension trust governed by ERISA and national CBA. The provision required employers participating in the trust to make trust contributions in the amount stated in the national CBAs. *Id.* at 474. After the national CBA expired, several employers negotiated separate CBAs rather than sign a successor national agreement. The individual CBAs modified employer contribution obligations. The trustees sued, claiming that the "evergreen clause" <u>in the trust documents</u> obligated the employers to continue making benefit plan contributions specified in the national CBA. In response, the employers argued that expiration of the national CBA, and the negotiation of separate CBAs, terminated their contribution obligation under the "evergreen clause."

This Court rejected the employers' argument. In reaching that result, this Court noted "the evergreen clause in the trust documents clearly does not include a durational limitation to the employer's duty to contribute." *Id*. at 473. The Court further stated: "We have no reason to question the propriety of an employer agreeing to be bound by contractual duties beyond the life of a specific collective bargaining agreement. *Id*. at 374, n.6 (citing *Litton Fin. Printing Div., v. NLRB*, 501 U.S. 190 (1991).

The rationale in *Pittston* applies with equal force here – the reservation of rights language in the BeneFlex plan documents contains no durational limitation. Accordingly, the parties' agreement has not expired and remains in force notwithstanding the expiration of the CBAs.

The Board majority's ruling also is inconsistent with the federal policy governing employee benefit plans because it effectively nullifies the agreed-upon reservation of rights language while requiring DuPont to continue to enforce all other BeneFlex terms. ERISA requires that DuPont follow all the terms of a plan as written, without exception. *See, e.g.*, *McGrath v. Auto-Body North Shore Inc.*, 7 F.3d 665, 670 (7th Cir. 1993); *Hunt v. Hawthorne Associates Inc.*, 119 F.3d 888, 892 (11th Cir. 1997). The NLRB's decision improperly amends BeneFlex plan documents by eliminating a critical term, contrary to ERISA's requirements for amending a welfare benefit plan. *See Burke v. PricewaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76 (2d Cir. 2009) (a court must not rewrite under the guise of interpretation, a term of a contract when the term is unambiguous); *Admin Comm. of Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680, 692 (7th Cir. 2003) ("we do not possess the authority to rewrite the Plan in [plaintiff's] benefit"); *Davolt v. Exec. Comm. O'Reilly Auto*, 206 F.3d 806, 810 (8th Cir. 2000) (court must apply a plan's plain language and cannot rewrite the plan even in sympathetic circumstances).

B. The Board's Decision Imposes Substantive Terms To Which The Parties Never Agreed, In Contravention of Longstanding Supreme Court Precedent

The Board attempts to minimize the significance of it ruling, claiming that its decision "impose[s] no great burden" on DuPont or "on the bargaining process." (App. 869). The Board majority suggests that allowing DuPont to continue to make the nationwide BeneFlex changes, as it had always done, "would have a profound effect on the lives of individual employees and their families." *Id*. But the Board majority goes even further, arguing that permitting employers like DuPont to continue to make changes to terms of employment during negotiations for a successor contract would be unfair because it would "forc[e] unions to bargain to regain benefits lost to post-expiration changes." *Id*. The Board majority's argument lacks evidentiary support and fails to appreciate the far-reaching effects that its decision will have on the parties here, and the bargaining landscape generally, if left to stand.

Simply stated, the Board's decision should be reversed because it changes the rules of the game after it has already started, and provides Union-represented employees with substantive BeneFlex benefits that are different from those provide to all other DuPont employees. The Supreme Court has long held that the Board cannot dictate substantive terms for the parties during bargaining. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103-104 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488, 490 (1960) (recognizing that the Act prevents the NLRB from intruding "into substantive aspects of the bargaining process").

The Board's ruling not only supplants the parties' decade-old agreements regarding BeneFlex, but also places the Board's thumb firmly on the scale in the Union's favor, providing the Union with significant negotiating leverage that undermines the purpose of the *status quo* doctrine set forth in *Katz*.

Pursuant to the logic in the Board's decision, DuPont had only two lawful choices, neither of which would have been realistic. Its first option would have been to delay implementation of nationwide changes for all 60,000 BeneFlex participants indefinitely, until agreements were reached with the Union at both Louisville and at Edge Moor. This option would grant the Union tremendous and unwarranted negotiation leverage. In effect, the reasonable BeneFlex changes affecting 60,000 participants nationwide would be held hostage to Union bargaining demands affecting fewer than 250 employees. The Supreme Court has made it clear that the Board is prohibited from "act[ing] at large in equalizing disparities of bargaining power between employer and union." *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 490 (1960).

Alternatively, DuPont could have implemented the 2004 nationwide BeneFlex changes for all plan participants <u>except</u> Union-represented employees at

Louisville, effectively creating two different BeneFlex plans. DuPont could then have implemented the 2005 BeneFlex changes nationwide for everyone except Union-represented employees at Edge Moor, creating a third BeneFlex plan. Despite the Board's unsupported assertions to the contrary, this result would impose a significant burden on the parties. As an initial matter, it would force DuPont to administer three separate BeneFlex plans. This option would have presented DuPont with substantial risk of class action litigation brought under ERISA. ERISA's civil enforcement provision permits an action by plan participants against a plan sponsor like DuPont for failure to follow the terms of the plan. *See* 29 U.S.C. § 1132(a)(1)(B). Moreover, having multiple benefit plans would negate, for all BeneFlex participants, at least some of the benefits derived from the economies of scale associated with participating in a single benefit plan covering one large population.

C. Continuation Of The Annual BeneFlex Changes Pursuant To The *Status Quo* Here Fosters Stable Labor Relations And Promotes Rather Than Undermines, Collective Bargaining

The Board majority overstates the dangers associated with permitting DuPont to continue its past practice here. Indeed, continuing the past practice actually "promote[s] the practice of collective bargaining," and certainly does not undermine labor-management relations."

First, unlike the broad discretion wielded by employers under broad management rights clauses found in CBAs, the discretion exercised by DuPont was limited to one small subject area – the benefits set forth in BeneFlex, which is only one of a dozen benefit plans covering Union-represented employees at Louisville and Edge Moor. (App. 475, 503-05, 706-07). And as this Court recognized, DuPont's discretion was further limited in that DuPont could not make unilateral changes during a plan year, and, consistent with ERISA obligations, all unilateral changes had to be applied in the same fashion to Union-represented employees and non-union employees.

Second, there is no risk of undermining the Union's authority or destabilizing union-management relations here. Unlike many, if not most, of the cases relied upon by the Board's majority (App. 858), the instant case does not involve changes made during first contract negotiations. DuPont has maintained stable union relations at Louisville and Edge Moor for many decades, spanning the periods before, during and after the BeneFlex changes at issue here. And implementing the BeneFlex changes at issue would not cause instability because, as demonstrated above, the changes are fully consistent with parties' agreement regarding BeneFlex. Moreover, given the long history of annual changes, there can be little doubt that Union employees had come to view annual, nationwide adjustments to BeneFlex as a term and condition of employment.

Third, as the Board's dissent notes, the right to make changes in accordance with established past practice would not, and did not, remove benefit issues from the bargaining table. Indeed, DuPont and the Union bargained over benefit issues before and after implementation of the BeneFlex changes at issue. DuPont simply maintained the *status quo* in the interim by continuing to provide Union-represented employees with BeneFlex benefits on the same terms as every other DuPont employee nationwide.

Fourth, the Board's newly created standard is both internally inconsistent and hopelessly vague. Member Miscimarra's dissent demonstrates that the Board decision creates "multiple different standards" which must be applied, depending on the factual context, to determine what constitutes a permissible "change" under *Katz* but offers no reasonable guidance in applying those standards. For example, in certain parts of its opinion, the Board states that unilateral changes must be virtually "automatic," "nondiscretionary" and implemented according to "fixed criteria" to be considered part of a dynamic *status quo*. (*See, e.g.*, App. 859, 864, 867, 868). Elsewhere, the Board suggests that some changes might be consistent with the *status quo* so long as they involved only a "little" rather than a "large measure" of discretion." *Id*. at 867, 868. But the Board's decision provides no readily discernable guidance on what, if any, discretion is too much, leaving employers, unions, the Board and reviewing courts with no principled way to determine with any reasonable degree whether any particular action will be considered lawful. Accordingly, interested parties will be left to make ad hoc determinations as to whether an action in any given case that involves some amount of discretion could be considered lawful, even if it is consistent with past practice. This is impermissible "ad hocery" at its worst, and an unacceptable outcome under the APA. *See Pacific Northwest Newspaper Guild v. NLRB*, 877 F.2d 1003 (D.C. Cir. 1989); *see also Comau Inc. v. NLRB*, 671 F.3d 1232, 1236 (D.C. Cir. 2012).

III. IMPLEMENTATION OF THE 2005 CHANGES AT EDGE MOOR WAS LAWFUL BECAUSE THE UNION WAS GIVEN A REASONABLE OPPORTUNITY TO BARGAIN

DuPont was permitted to make the 2005 BeneFlex changes at Edge Moor for a second, independent reason: the Union failed to seek bargaining over the recurring changes despite having ample opportunity to do so. An employer ordinarily must refrain, during contract bargaining, from implementing changes to subjects covered by its bargaining duty, absent agreement or overall impasse. *Bottom Line Enterprises*, 302 N.L.R.B. 373, 374 (1991), *enforced sub nom.*, *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *Our Lady of Lourdes Health Center*, 306 N.L.R.B. 337, 339-340 (1992). However, this general rule does not apply to discrete recurring events "that simply happen to occur while contract negotiations are in progress." *Stone Container Corporation*, 313 N.L.R.B.

336 (1993). With such "annually occurring events," an employer must only give its union prior notice and an opportunity to bargain; it need not wait for an overall impasse in negotiations to address such events. *Stone Container*, 313 N.L.R.B. at 336; *see also Brannan Sand and Gravel Co.*, 314 N.L.R.B. at 282 (where healthcare costs and benefits were annually reviewed and adjusted, the employer was not obligated to refrain from implementing proposed changes until impasse was reached on negotiations as a whole); *St. Gobain Abrasives, Inc.*, 343 NLRB 542 (2004), *enf'd*, 426 F.3d 455 (1st Cir. 2005); *Nabors Alaska Drilling*, 341 N.L.R.B. at 610.

Upon receiving notice of a recurring, discrete event, the "union must act with due diligence to request bargaining (*Bell Atlantic Corp.*, 336 N.L.R.B. 1076, 1086 (2001)) and then affirmatively act to effectuate bargaining; a token request to bargain is insufficient. *AT&T Corp.*, 337 N.L.R.B. 689 (2002).

The NLRB undertook a detailed review of these legal principles in *TXU Electric Company*, 343 N.L.R.B. 1404 (2004). Relying upon *Stone Container* and *Alltel Kentucky*, 326 N.L.R.B. 1350 (1998), the Board reaffirmed that an employer, after notice and an opportunity for bargaining, may unilaterally address an annually recurring "discrete event" without having reached overall agreement or impasse:

> . . . this case deals with a situation in which piecemeal treatment is unavoidable, at least on an interim basis. The date for annual

> review and possible wage adjustment was approaching. Absent a contract on that date, the Respondent had to do *something* with respect to that matter. It could not wait for an overall impasse.

TXU Electric., 343 N.L.R.B. at 1407.

At Edge Moor, the Union never sought to bargain the 2005 BeneFlex changes beyond the token request made through one Union letter, which the Union negotiators themselves ignored in favor of bargaining over benefits generally in an effort to reach an overall contract. The Union's failure to address the annual changes across the table in any of the parties' numerous face-to-face negotiating sessions in the fall of 2004 permitted DuPont to implement the 2005 BeneFlex changes while continuing to bargain for a successor CBA.

Moreover, the changes at issue here are fully consist with the changes lawfully implement in *Brannan Sand and Gravel*, *Saint-Gobain* and *Nabors Alaska Drilling*. Indeed, the facts here are strikingly similar to those in *Nabors Alaska Drilling*, 341 N.L.R.B. at 610. There, the employer reviewed its healthcare plan at year's end, often adjusting many items such as benefit levels, co-payments and administrators. While actively negotiating healthcare as part of broader contract bargaining, the employer notified the union that it intended to make certain program changes effective January 1. The union made no proposals on the changes and the employer implemented the changes, just like DuPont here, while continuing to bargain towards an overall resolution of the contract.

The Board glossed over all of DuPont's arguments on this point and simply reaffirmed its prior, incorrect, finding that the BeneFlex changes were not permitted under *Stone Container*. (App. 866). The Board's failure to apply the *Stone Container* line of cases in a manner consistent with established Board precedent renders the Board's Order regarding the 2005 BeneFlex changes at Edge Moor arbitrary and capricious. *See NLRB v. Southwest Reg'l Council of Carpenters*, 826 F.3d 460 (D.C. Cir. 2016).

IV. THE BOARD ERRED BY APPLYING ITS DECISION RETROACTIVELY DESPITE ESTABLISHING A NEW LEGAL STANDARD AND EXPRESSLY OVERRULING LONGSTANDING BOARD AUTHORITY UPON WHICH DUPONT RELIED

Assuming the Board's decision on the merits is correct (which it is not), the Board erred by applying its order retroactively given that the Board's decision expressly overrules longstanding Board precedent. As this Court has noted, a "fundamental norm" of administrative law requires that a party must receive fair notice of the legal standards an agency will apply to its conduct. *Marrie v. SEC*, 374 F.3d 1196, 1206 (D.C. Cir. 2004). This principle applies with equal force in the labor relations context, where the Supreme Court expressly recognized that employers have a need for "certainty beforehand" so they can make business decisions "without fear of later evaluations labelling . . . conduct an unfair labor practice." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981).

The law is equally clear that the NLRB may not apply a new legal standard retroactively where, as here, a party has relied upon the former standard. *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001).

Here, the Board's decision applies a new standard that is dramatically different than the legal standard that DuPont (and other employers) have relied upon. The BeneFlex changes at issue were clearly lawful at the time they were implemented under extant Board law, such as *Courier-Journal*, *Capitol Ford*, and *Shell Oil*, as this Court made clear in *DuPont I*. Indeed, the Court remanded the case with the express instruction to confirm its prior decision to that Board precedent or explain its departure from it. Unable to reconcile its decision with the prior Board law upon which DuPont relied, the Board expressly overruled it: "[W]e conclude that *Courier-Journal* cannot be reconciled with longstanding precedent … [w]e therefore overrule it and other decisions to the extent that they depart from that precedent." (App. 866). While the Board claims that its decision to overturn *Courier-Journal* and other decisions like it, is consistent with its prior decisions in *Beverly 2001* and *Register Guard*, the Board admits, as it must, that both *before* and *after* its 2001 and 2003 decisions in *Beverly I* and *Register Guard*, "there have been Board decisions holding that employers lawfully adhered to a past practice of broad discretionary changes." (App. 868). Moreover, DuPont's implementation of annual changes to BeneFlex is consistent with its ERISA obligations.

Ignoring the impact of its decision, both on DuPont and employers generally, the Board asserts, without any reasoned analysis, that retroactive . application of its decision will result in "no manifest injustice."[4] The only rationale the Board offers to support that conclusion is the assertion that "its analysis is consistent with longstanding precedent and well established principles." That conclusory allegation is not only unsupported by the relevant facts and law, but is remarkable in light of the fact that the Board expressly overruled *Courier-Journal*, *Capitol Ford*, *Beverly 2006*, and purported to overrule the entire *Shell Oil* "line of cases."

DuPont had no prior notice that the Board would change direction and attempt to overrule 50+ years of Board law that DuPont relied upon, and which sanctioned the BeneFlex changes at issue.

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[4] To determine whether retroactive application of a decision would result in "manifest injustice," the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *See WKYC-TV, Inc.*, 359 N.L.R.B. 286, 293-94 (2012) (Board decided not to apply decision retroactively because, despite prior precedent being "called into question on several recent occasions, the Respondent and other similarly situated employers did not have adequate warning that the Board was about to change the law" and the ruling represented "a change in longstanding substantive Board law governing parties' conduct, rather than a mere change to a remedial matter).

In short, there is no reasoned justification for applying the Board's new standard retroactively, especially when doing so would effectively penalize action that was lawful under Board precedent at the time it was taken.

CONCLUSION

To reach the outcome it desired, the Board bent beyond recognition the legal test announced in *Katz* for analyzing potential changes to the *status quo*, and then mischaracterized long-standing Board law regarding past practice. The Board's decision is not only contrary to *Katz* and 50 years of Board law, but also re-writes the parties' agreement by foisting upon them substantive terms that were never negotiated. Because the parties specifically negotiated and reached agreement with regard to Union participation in BeneFlex, because that agreement has not expired, and because this topic is covered by contract, the Court should reverse Board and give effect to the parties' decade-long agreement.

Adopting the standard now advocated by the Board majority would not only yield the wrong result in this case, but would threaten to unravel numerous labor-management agreements covering nationwide benefit plans to the detriment of both employers and employees. Employers would be incented to simply stop including union-represented in their company-wide benefit plans, and the splintering of benefit plans deprive all plan participants of the advantages of the economies of scale associated with a single benefit plan covering union and non-union employees alike.

Based on all of the foregoing, DuPont asks that the Court grant its Petition for Review and deny enforcement of the NLRB's Orders below.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: April 21, 2017

/s/ Thomas P. Gies
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 21st day of April, 2017, I caused this Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 21st day of April, 2017, I caused the required copies of the Brief of Petitioner to be hand filed with the Clerk of the Court.

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ADDENDUM

TABLE OF CONTENTS
TO ADDENDUM

Page

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * *

ERISA § 404(a)(1)(D)

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.